TOPICS:

Motion for Summary Judgment
Excess Liability Trust Fund, ELTF
eligibility determination
Underground Storage Tank, UST
leaking underground storage tanks
community right to know
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Spill rule
affidavit
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329 IAC 9-4-1
discover
Spill Report
IC 12-18
IC 12-23
327 IAC 2-6.1

PRESIDING JUDGE:

Davidsen

PARTY REPRESENTATIVES:

Petitioner: John D. Moriarty, Esq. and Christopher J. Braun, Esq.
IDEM: Julie E. Lang, Esq.

ORDER ISSUED:

June 27, 2007

CATEGORY INDEX:

Land

FURTHER CASE ACTIVITY:

[none]

STATE OF INDIANA	)	BEFORE THE INDIANA OFFICE OF
	)	ENVIRONMENTAL ADJUDICATION
COUNTY OF MARION	)	
IN THE MATTER OF:	)	
	)	
OBJECTION TO THE DENIAL OF	)	
EXCESS LIABILITY TRUST FUND CLAIM	)	
OF ROWE BROTHERS, INC.	)	
ELTF NO. # 200309508 / FAC ID NO. 5341	)	
INDIANAPOLIS, MARION COUNTY, INDIANA.	)	
_____	)	CAUSE NO. 05-F-J-3650
	)	
Rowe Brothers, Inc.,	)	
Petitioner,	)	
Indiana Department of Environmental Management,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER GRANTING ROWE BROTHERS' MOTION FOR SUMMARY JUDGMENT

This matter came before the Office of Environmental Adjudication ("OEA" or "Court") on Petitioner Rowe Brothers, Inc.'s ("Rowe Brothers") Motion for Summary Judgment, and upon the Indiana Department of Environmental Management's ("IDEM") Cross-Motion for Summary Judgment concerning IDEM's December 7, 2005 letter denying ("denial") Rowe Brothers' claim for reimbursement from the Excess Liability Trust Fund ("ELTF") in the amount of $73,352.75. Petitioner Rowe Brothers was represented by legal counsel John D. Moriarty, Esq. and Christopher J. Braun, Esq. The Indiana Department of Environmental Management ("IDEM") was represented by legal counsel Julie E. Lang, Esq. The parties filed responses, replies, and oral argument was heard on April 2, 2007, all of which are a part of the Court's record:

AND THE COURT, being duly advised and having considered the petitions, pleadings, motions, evidence and the briefs, responses and replies, finds that judgment may be made upon the record and makes the following findings of fact and conclusions of law and enters the following Final Order:

Findings of Fact

1. Rowe Brothers owns and operates underground storage tanks ("USTs") and a gasoline service station located at 2801 Massachusetts Avenue, Indianapolis, Indiana (the "Site"). In 2003 Rowe Brother's president, Vern Rowe, planned to sell the Site and requested that its environmental consultant, Capital Environmental Enterprises, Inc. ("Capital"), complete a phase II environmental investigation at the request of the Buyer. Davies H. Batterton, Capital President, stated in a June 1, 2006 affidavit that he had personal knowledge of Capital's work for Rowe Brothers. Both Capital and Rowe Brothers are small companies; Vern Rowe and Davies Batterton are the primary persons in each of their organizations who are authorized to deal with environmental concerns addressed in this case.

2. On July 30, 2003, Rowe Brothers received IDEM's July 24, 2003 Offsite Contamination and Site Check Request (sent via certified mail), indicating that a petroleum release was detected in a monitoring well in the public right-of-way next to Rowe Brothers' facility. The July 24, 2003 letter further requested that an environmental investigation be performed and tank tightness testing be conducted to determine whether Rowe Brothers was the source of the detected release.

3. Capital conducted a site investigation and collected soil and groundwater samples at the Site on July 28, 2003; Vern Rowe and Davies Batterton were present. During Capital's site investigation on July 28, 2003 no free product, vapor, petroleum sheen, or other reportable petroleum release was discovered on the Site or on nearby properties. In addition, there were no unusual operating conditions related to the petroleum dispensing equipment.

4. On August 14, 2003, the lab results from the July 28, 2003 drilling were delivered by mail to Capital, and received by Capital's administrative staff. The lab results included the testing requested in IDEM's July 24, 2003 Offsite Contamination and Site Check Request.

5. Further drilling was conducted at the site on August 27, 2003. Per its Site Investigation Report, Capital stated that this drilling was performed in response to confirmed petroleum impacts found on August 14, 2003 in the July 28, 2003 samples.

6. During the late summer of 2003 Rowe and Batterton left Indianapolis for their respective family vacations. Rowe was on a family vacation in Las Vegas, Nevada from the middle of August 2003 until September 15, 2003. Batterton was on a family vacation in the Minnesota-Canada boundary region from September 4, 2003 until Monday, September 15, 2003. Consequently, Batterton and Rowe were unable to discuss the lab results for the Site until Monday, September 15, 2003 when Rowe returned from his vacation. Prior to Rowe's return to work on Monday, September 15, 2003, Rowe Brothers was unaware of the petroleum release at the Site.

7. Upon returning to work on Monday September 15, 2003, Rowe discussed the laboratory test results with his consultant, Batterton, and first learned that petroleum had been released into the soil and/or groundwater above IDEM's action levels. Consequently, Rowe Brothers did not discover the release until Monday, September 15, 2003 when both Batterton and Rowe had returned from their respective vacations and discussed the laboratory results. Upon discovery of the release, Capital and Rowe Brothers reported the release to IDEM on September 15, 2003, within 24 hours of Rowe Brothers' discovery of the release. After reporting the release to IDEM, Rowe Brothers submitted an initial site characterization ("ISC") and corrective action plan ("CAP") to IDEM. IDEM approved Rowe Brothers' ISC and CAP by respective letters dated January 4, 2005 and December 16, 2005.

8. On October 27, 2003, Rowe Brothers filed a Request for Eligibility Determination for reimbursement from the ELTF, under Leaking Underground Storage Tank ("LUST") incident number 200309508. No amount of money was claimed.

9. IDEM's underground storage tank, leaking underground storage tanks, community right to know, emergency response database, referred to as ULCERS, contained data that Rowe Brothers' eligibility request was reviewed on March 1, 2004, a denial letter approved on March 15, 2004, and mailed on March 16, 2004. This information was entered into ULCERS by Mistie Carter, an employee of Navigant, IDEM's then-consultant assigned to such duties.

10. Evidence concerning IDEM's action on Rowe Brothers' October 27, 2003 eligibility request was provided in a January 26, 2007 affidavit from Paul Serguta, Chief, Finance and Operations, Office of Land Quality, Excess Liability Trust Fund, IDEM. Mr. Serguta's affidavit stated that his duties include reviewing and approving ELTF claim determinations.

11. Mr. Serguta did not aver that he had personal knowledge of the events entered into the ULCERS database. Mr. Serguta's affidavit further stated that Mistie Carter "would" have had personal knowledge of the events entered into the ULCERS database, that she processed and mailed "many" of the events entered into ULCERS, but that she was no longer working with IDEM or its consultant. Mr. Serguta further averred that IDEM's recording of Rowe Brothers' October 27, 2003 ELTF claim into ULCERS was a regular business practice and made in the normal course of business.

12. IDEM tendered its copy of its letter denying Rowe Brothers' October 27, 2003 eligibility request as an attachment to Mr. Serguta's affidavit. The denial letter tendered to the Court was neither signed nor dated; IDEM stated that the original, signed and dated letter was mailed to Rowe Brothers by first class mail, without receipt (such as receipt requested or certified mail). The denial letter stated:

> [Y]ou may appeal this determination by filing a written request for review with the Indiana Office of Environmental Adjudication not later than fifteen (15) days after receiving notice of the determination.

13. On March 2, 2007, Rowe Brothers moved to strike paragraphs 5 through 10 of Mr. Serguta's affidavit as speculative, not based on personal knowledge, not admissible under Ind. Code § 4-21.5-3-23, and the affidavit's attachments were not authenticated. In response, IDEM objected on March 16, 2007.

14. Rowe Brothers asserted that it did not receive a response from IDEM, nor did it receive IDEM's determination letter on its October 27, 2003 eligibility request until 2006, as an exchange between legal counsel pursuant to the litigation of this cause.

15. Substantial evidence is present that Rowe Brothers did not receive IDEM's First Determination Letter.

16. On November 22, 2005 Rowe Brothers submitted a second claim to the ELTF ("Second ELTF Claim") in the amount of $73,352.75. The Second ELTF Claim contained new and additional information that was not contained in the October 27, 2003 ELTF eligibility request, specifically (A) the 2005 ELTF claim was for reimbursement of remediation expenses instead of a request for eligibility determination; (B) the 2005 ELTF claim contained detailed invoices, invoice cost summaries, laboratory backup documentation, detailed pay requests and other documents from its environmental consultant Capital that were not contained with the 2003 ELTF eligibility request.

17. On December 19, 2005 Rowe Brothers received a letter from IDEM dated December 7, 2005 sent via Certified Mail Number 7005 1160 0001 2607 1351 ("IDEM's Second Determination Letter"). IDEM's Second Determination Letter denied Rowe Brothers' Second ELTF Claim for reimbursement of remediation expenses in the amount of $73,352.75.

18. IDEM's December 7, 2005 ELTF denial letter states:

> In accordance with 329 IAC 9-4 and 327 IAC 2-6.1, communicate a spill report to IDEM: The applicant is not in substantial compliance with this requirement. Though evidence of contamination was found earlier (groundwater samples from July 28, 2003), the release was not reported to IDEM until September 15, 2003.
>
> Owner or operator has paid at least 50% of UST registration fees when due: The applicant is in substantial compliance with requirement and is eligible to receive 100 % of eligible costs. However, this percentage is not applicable until substantial compliance is demonstrated for the above requirement . . .
>
> * * *

> Your claim was submitted for $73,352.75. After review by the ELTF section, your claim has been approved for $0.00.

19. On December 23, 2005 Rowe Brothers timely filed its Petition for Review with the Indiana Office of Environmental Adjudication ("OEA") alleging that Rowe Brothers timely reported the release of petroleum to IDEM as soon as it was discovered and that Rowe Brothers was in "substantial compliance" with all ELTF requirements. Rowe Brothers filed its motion for summary judgment and designated evidence, including the deposition of IDEM's Assistant Commissioner, Bruce Palin, which Rowe Brothers presented as confirmation that IDEM's spill reporting period w1as at least 30 days and not 24 hours as claimed by IDEM in its denial letters.[1]

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management, the ELTF Administrator, and the parties to this controversy pursuant to IC §4-21.5-7, et seq. *Johnson Oil Co.*, Cause No. 03-F-J-3279 (2005 OEA 63, 66).

2. This is a Final Order issued pursuant to IC § 4-21.5-3-27 and 315 IAC 1-2-1(9). Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.

3. Consistent with Indiana Trial Rule 56(C), IC § 4-21.5-3-23(b) provides "[t]he judgment [on a motion for summary judgment] shall be rendered immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. IC § 4-21.5-3-23. Ind. T.R. 56(C). *Wade v. Norfolk and Western Railway Company*, 694 N.E.2d 298, 301 (Ind. Ct. App 1998).

[1] Rowe Brothers relies upon statements made by IDEM's Assistant Commissioner Bruce Palin ("Palin") in a deposition dated August 12, 2005 that IDEM's policy was to pay ELTF claims if the petroleum release was reported to IDEM within 30 days ("IDEM's 30-Day Reporting Rule"). Mr. Palin stated "Although the underground storage tank rules require reporting of a release within 24 hours, we [IDEM] have, as a policy, accepted a report of a release within . . . 30 days of discovering a release." Palin Depo., pg. 31. The policy referred to by Mr. Palin is neither promulgated nor published, nor is it necessary to this decision to apply it in this instance.

4. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of their pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Ind. T.R. 56(E); IC § 4-21.5-3-23(f). If they do not so respond, summary judgment, if appropriate, shall be entered against them. An administrative law judge serves as the trier of fact in an administrative hearing and must conduct a *de novo* review of the agency's determination rather than deferring to the agency's initial determination. *Indiana Department of Natural Resources v. United Refuse Company, Inc.*, 615 N.E.2d 100,104 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner*, IDEM, 820 N.E.2d 771, 781 (Ind. Ct. App. 2005).

5. The OEA's findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge ("ELJ") and deference to the agency's initial factual determination is not allowed. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.,* 615 N.E. 100 (Ind. 1993); *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771, 781 (Ind. App. 2005).

6. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Envtl. Adjud.*, 811 N.E.2d 806, 809 (Ind., June 30, 2004)(appeal of OEA review of NPDES permit); *see also* Ind. Code § 4-21.5-3-27(d). While the parties' evidence disputed whether IDEM's determination on the resubmitted claims complied with Ind. Code § 13-23-9-2, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." Ind. Code § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA at 129. *See also Blue River Valley*, 2005 OEA at 11, 12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.

7. Rowe Brothers filed a motion to strike IDEM's Affidavit of Paul Serguta ("Serguta Affidavit") and the attached letter from IDEM that denies Rowe Brothers first ELTF claim ("IDEM's First Determination Letter"). IDEM's First Determination Letter is unsigned and undated. Rowe Brothers' sought to strike the Serguta Affidavit and IDEM's First Determination Letter on allegations that they were: (1) speculative; (2) not based on personal knowledge; (3) not admissible under Indiana's Administrative Orders And Procedures Act ("AOPA") - Ind. Code § 4-21.5-3-23; and (4) are not authenticated.

8. AOPA requires that affidavits "must: (1) be made on personal knowledge; (2) set forth facts that are admissible in evidence; and (3) show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Ind. Code § 4-21.5-3-23. Indiana's appellate courts have long held that trial court should properly strike affidavits and other exhibits that lack authentication and foundation. *Lytle v. Ford Motor Co.*, 814 N.E.2d 301, 317 (Ind. Ct. App. 2004); *Pathman Construction Co. v. Drum-Co. Engineering Corp.*, 402 N.E.2d 1, 8 (Ind. Ct. App. 1980). Likewise the Office of Environmental Adjudication ("OEA") has held that "in order for the Environmental Law Judge to consider evidence attached to the motion for summary judgment, the evidence must be admissible." *Medora Sanitary Landfill*, 2006 OEA 35, 38 (Emphasis added).

9. IDEM offered the Serguta Affidavits as support that IDEM mailed an unsigned and undated letter to Rowe Brothers ("IDEM's First Determination Letter"). The Serguta Affidavits do not identify the person who mailed IDEM's First Determination Letter. Serguta does not state that he mailed the letter. Instead Serguta states that records indicate that the letter was sent via U.S. mail on March 16, 2004. The following information is missing from the IDEM's First Determination Letter and the Serguta Affidavit: (A) the name of the person who mailed the letter; (B) the name of the person who signed the letter; (C) the date the letter was written; and (D) the date the letter was allegedly mailed to Rowe Brothers. IDEM provides a second Affidavit from Serguta ("Second Serguta Affidavit") that provides information on IDEM's computer database but does not provide any new information to authenticate the First Determination Letter.

10. There is no clear indication who signed or mailed the IDEM's First Determination Letter. However, Mr. Serguta's affidavit provided sufficient foundation that IDEM's First Determination Letter is a business record. The Serguta Affidavit and its attachments will not be stricken, will be admitted as hearsay as a business record, and Rowe Brothers' objections will be noted as affecting the weight to be afforded this evidence.[2]

11. IDEM presented substantial evidence of its general business practices concerning documentation of ELTF correspondence via ULCERS, but did not present substantial evidence of correspondence from IDEM specific to the Rowe Brothers' October 27, 2003 eligibility request, nor that Rowe Brothers was sent or received the First Determination Letter. Rowe Brothers presented substantial evidence that it did not receive the First Determination Letter.

[2] Rowe Brothers seeks a ruling that the calculation of its time to file an appeal of the First Determination Letter begins with its receipt of the letter, as held in *IDEM v. Coulopoulos*, Cause No. 06-S-E-3683 (OEA 2006). This decision does not require the Court to reach this issue, so the Court will not determine here whether *Coulopoulos*, which interpreted statutes applicable to enforcement cases, applies to general AOPA and ELTF statutes.

12. Even if Rowe Brothers had received IDEM's First Determination Letter, under *Benzol II* Rowe Brothers is permitted to proceed with its Petition for Review because it contains new information not known at the time of IDEM's First Determination Letter. *Benzol Cleaning Company, Inc.*, Cause Number 04-F-J-3473 (OEA 2006) dated April 6, 2006 ("*Benzol II*"). Rowe Brothers second ELTF claim submitted to IDEM in November 2005 and related appeal is a new and different claim including new information concerning IDEM's 30-Day Spill Reporting Rule. Thus Rowe Brothers may proceed with its Petition For Review based on *new* information.

13. In *Benzol II* Judge Gibbs held:

> There may be instances**,** particularly under the ELTF program, when a claim may be denied and resubmitted repeatedly if the claimant can provide *new* information for the IDEM to consider. The IDEM notice to the Petitioners state that if the Petitioners can demonstrate substantial compliance with the spill reporting requirement, then the Petitioners will be eligible to receive reimbursement of 53% of their eligible corrective action cost.

Benzol II, pg. 5. Rowe Brothers' second ELTF claim is a different claim with new information. Under *Benzol II* Rowe Brothers is permitted to proceed with this new claim.

14. Pursuant to 329 IAC 9-4 a UST owner must report to IDEM the discovery of a release of petroleum within 24 hours.[3] Such discovery includes the presence of free product in soils, basements, storm, utility or sanitary sewer lines, surface water or ground water. 329 IAC 9-4-1. Unusual operating conditions or release detection monitoring results which indicate a release may have occurred also must be reported. 329 IAC 9-4-1. As described more fully below, Rowe Brothers has fully complied with these provisions.

[3] 328 IAC 1-1-9 and IC § 13-23-8-4 have been modified numerous times since their promulgation. The 2003 versions are applicable to Rowe Brothers ELTF claim and are cited in this memorandum. In addition, the laws and regulations cited in this Final Order are the versions in effect on July 27, 2003.

15. 329 I.A.C. 9-4-1 states:

> The owner and operator of a UST system shall report to the agency [IDEM] within twenty-four (24) hours and follow the procedures in 329 I.A.C. 9-5-4.1 for any of the following conditions:
> (1) The discovery by the owner and operator or another person of release regulated substances at the underground storage tank site or in the surrounding area. Released regulated substances may include the presence of free product or vapors in any of the following:
> (A) Soils.
> (B) Basements.
> (C) Storm sewer lines.
> (D) Sanitary sewer lines.
> (E) Utility lines.
> (F) Nearby surface water.
> (G) Ground water.
> (2) Unusual operating conditions observed by the owner and operator that may include the erratic behavior of product dispensing equipment, the sudden loss of product from the UST system, or an unexplained presence of water in the tank unless the system equipment is:
> (A) found to be defective but not leaking; and
> (B) immediately repaired or replaced.

16. Per the terms of 329 IAC 9-4-1 in 2003, the "owner and operator of a UST system" in this case is Rowe Brothers, and therefore, is responsible for reporting a release under 329 IAC 9-4-1.

17. Rowe Brothers provided affidavits from two eyewitnesses, Vern Rowe ("Rowe") and Dave Batterton ("Batterton"), that were present on the Site on July 28, 2003; these eyewitnesses did not discover a release. Both Rowe and Batterton confirm that during Capital's site investigation, in which Capital collected soil and groundwater samples at the Site on July 28, 2003, no free product, vapors, petroleum sheen, or other reportable petroleum release was discovered on Site or on nearby properties. In addition, there were no unusual operating conditions related to the petroleum dispensing equipment. IDEM has not presented evidence that Rowe Brothers was aware of a release on July 28, 2003, nor has it contested the testimony of these witnesses. At oral argument, IDEM counsel indicated that when releases are not detectable on-site, above-ground, as is frequently the case, that the owner and operator would not be aware that a release had occurred. There is no substantial evidence of a reportable release on July 28, 2003.

18. Unique circumstances attach to the timing of receipt of results by Rowe Brothers, and the reporting of the results to IDEM. The consultant and owner/operator were small companies which had delegated the responsibility for environmental compliance for this facility to one individual, and no evidence was presented that other individuals within each company were skilled or authorized to address Rowe Brothers' ELTF claim. Substantial evidence was presented that Rowe Brothers, as owner and operator, received the results indicative of contamination on September 15, 2003. No evidence was presented that timing of delivery of this information to Rowe Brothers could reasonably have been delivered more promptly, nor intentionally delayed.

19. Rowe Brothers communicated the release to IDEM on September 15, 2003 which was the same day that it discovered the release. Substantial evidence was presented that Rowe Brothers complied with 329 IAC 9-4-1.

20. IDEM also denied Rowe Brothers ELTF claim on the basis that Rowe Brothers failed to communicate a spill report to IDEM within two hours, in violation of 327 I.A.C. 2-6.1 (the "Spill Rule").[4] This Court held the Spill Rule does not apply to a determination on whether a person is eligible for the ELTF. *In the Matter of: Request for Review, Speedway SuperAmerica LLC, Speedway Station #6672, ELF #200105505/FAC ID 15832, Hobart, Lake County, Indiana,* 05-F-J-3564 (OEA Cause 05-F-J-3564, March 16, 2006), at 5. In addition, Judge Gibbs stated "IDEM cannot require compliance of any degree with 327 I.A.C. 2-6.1 [the Spill Rule] as a prerequisite for ELTF eligibility." *Speedway*, at 5. The Court found the Spill Rule does not apply because the applicable statute for ELTF claims, Ind. Code § 13-23-8-4(a)(1) only requires substantial compliance with those rules adopted under Ind. Code § 13-7-20 (currently Ind. Code § 13-23) for ELTF reimbursement. *Speedway*, at 5.

21. The Spill Rule was adopted by the Water Pollution Control Board under the water pollution control laws (Ind. Code § 12-18) and not under the UST laws (Ind. Code § 12-23). *Speedway,* at 5. Judge Gibbs held:

> A rule under 328 I.A.C. that attempts to require compliance with the Spill Rule [327 I.A.C. 2-6.1] as a condition for ELTF eligibility is invalid and the IDEM may <u>not</u> condition eligibility for ELTF eligibility upon the owner or operator's compliance with this rule.

[4] The Spill Rule, 327 I.A.C. 2-6.1-7 states:

> Any person who operates, controls, or maintains any mode of transportation or facility from which a spill occurs shall, upon discovery of a reportable spill to the soil or surface waters of the state, do the following:
> (1) Contain the spill, if possible, to prevent additional spilled material from entering the waters of the state,
> (2) Undertake or cause others to undertake activities needed to accomplish a spill response.
> (3) As soon as possible, but within two (2) hours of discovery, communicate a spill report to the IDEM . . .
> (4) Submit to the IDEM a written copy of the spill report if requested in writing by the department . . .

Speedway at 5. IDEM's denial of Rowe Brothers' ELTF claim based on alleged non-compliance with the Spill Rule is contrary to law and is arbitrary and capricious. *See Speedway*, at 5. The Court finds that IDEM's denial of the ELTF claim based on the Spill Rule was contrary to law and was arbitrary and capricious.

22. In its denial letter, IDEM stated two reasons (violations of 329 I.A.C. 9-4-1 and 327 I.A.C. 2-6.1) to deny Rowe Brothers' ELTF claim. Pursuant to IC § 13-23-9-2(d), IDEM is required to notify Rowe Brothers of all the reasons for the denial of its ELTF claim in the initial denial letter. In *Okun,* the Marion Superior Court, the Hon. Michael D. Keele, upheld this requirement and stated: "The applicable statute requires that 'the administrator shall notify the claimant of all reasons for a denial or partial denial.' IC § 3-23-9-2(d)." *Indiana Department of Environmental Management v. Okun,* Cause No. 49F12-0410-PL-003215 (Marion Superior Court), dated April 13, 2005. A recipient of a denial letter, when given timely and sufficient notice of the specific facts to invoke the rule-based reason for denial of a claim, is clearly on notice of the denial reasons. *Id.* In this case, IDEM placed Rowe Brothers on notice for the denial reasons. Substantial evidence does not support IDEM's two bases for denial.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petitioner Rowe Brothers, Inc.'s Motion for Summary Judgment and Petition for Administrative Review is hereby **GRANTED,** and Respondent Indiana Department of Environmental Management's Cross-Motion for Summary Judgment is **DENIED.** The Court finds that Rowe Brothers is entitled to reimbursement for its eligible remediation expenses from Indiana's Excess Liability Trust Fund ("ELTF") on its claim in the amount of $73,352.75.

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED THIS 27th DAY OF June, 2007.

Hon. Mary L. Davidsen
Chief Environmental Law Judge